

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:NER:MAN:TL-N-4286-00 and 4284-00  
PLDarcy

date:

to: Territory Manager Robert Skiba  
Attn: Mr. David Harris  
Mr. Lawrence Paduano

from: District Counsel, Manhattan

subject:

Tax Years Ended [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED]  
[REDACTED], [REDACTED]

Extension of the Statute of Limitations at the Partner Level


Uniform Issue List # 6229.02-00

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This memorandum follows up on our on our memorandum dated July 27, 2000, which responded to your request for additional advice on how to extend the statute of limitations for the assessment of partnership items and affected items from [REDACTED] ("Partnership"), a Delaware limited partnership subject to the uniform partnership audit procedures, I.R.C. § 6221 et. seq. The advice rendered in this memorandum is conditioned on the accuracy of the facts presented to us. Our advice of July 27, 2000 was approved by the National Office. The advice contained in our July 27, 2000 memorandum represents our advise on how best to extend the statute of limitations on assessment for the taxable years in issue.


(b)(7)a, (b)(5)(AC)

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(b)(7)a, (b)(5)(AC)



This advice is subject to National Office review. Due to the obvious time constraints, we will request the National Office to immediately review this advice and we will immediately contact you to discuss the National Office's comments, if any, about this advice. The earliest statute of limitations expires on .

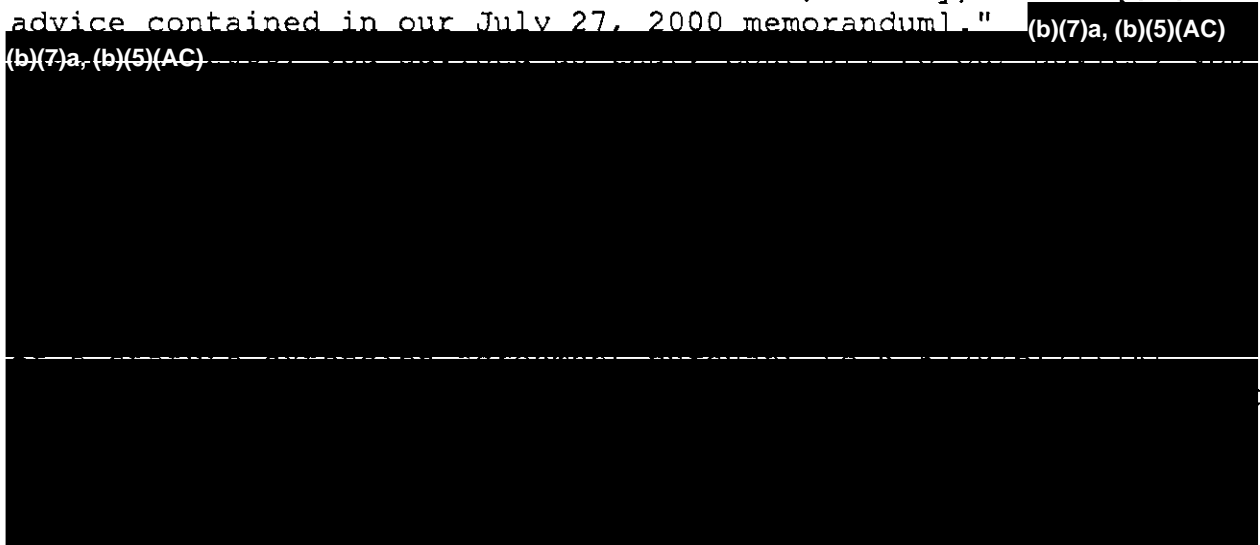
FACTS:

THE ADVICE IS RENDERED ON THE BASIS THAT ALL THE REPRESENTATIONS AND FACTS IN THIS MEMORANDUM ARE CORRECT. WE RECOMMEND THAT YOU VERIFY THIS INFORMATION. IF ANY OF THE REPRESENTATIONS AND/OR FACTS ARE INCORRECT OR CANNOT BE SUBSTANTIATED, WE MAY NEED TO MODIFY OUR ADVICE.

The relevant facts regarding events prior to July 27, 2000 are discussed in our memorandum of that date. In the interest of expedience and clarity, we do not repeat those facts. Those facts are, however, incorporated by reference herein.

In our memorandum dated July 27, 2000, we stated that "[w]e will contact you within two weeks of the date of this memorandum to discuss the National Office's comments, if any, about [the advice contained in our July 27, 2000 memorandum]." (b)(7)a, (b)(5)(AC)

(b)(7)a, (b)(5)(AC)



(b)(7)a, (b)(5)(AC)

(b)(7)a, (b)(5)(AC)

DISCUSSION:

I. . . . .EQUITABLE ESTOPPEL

(b)(7)a, (b)(5)(AC)

(b)(7)a, (b)(5)(AC)

(b)(7)a, (b)(5)(AC)

Generally speaking, equitable estoppel precludes a party from denying that party's own acts or representations which induced another to act to the other's detriment. Union Texas International Corp. v. Commissioner, 110 T.C. 321 (1998); Graff v. Commissioner, 74 T.C. 743, 761 (1980), affd. per curiam 673 F.2d 784 (5th Cir. 1982). The doctrine of equitable estoppel is based on the grounds of public policy, fair dealing, good faith, and justice, and is designed to aid the law in the administration of justice where without its aid injustice might result. Id. The elements of equitable estoppel are as follows: (1) There must be a false representation or wrongful misleading silence by the party against whom the estoppel is claimed; (2) the error must originate in a statement of fact, not in opinion or a statement of law; (3) the party claiming the benefits of the estoppel must have actually and reasonably relied on the acts or statement of the party against whom the estoppel is claimed, and as a consequence of that reliance must be adversely affected by the acts or statements of the one against whom an estoppel is claimed; and (4) the party claiming the benefits of estoppel must not know the true facts. Century Data Sys., Inc. v. Commissioner, 86 T.C. 157, 165 (1986); Graff, 74 T.C. at 761; Steiner v. Commissioner, T.C. Memo. 1995-122. The party affirmatively asserting an estoppel has the burden of proving all the essential elements constituting the estoppel. Steiner, T.C.

Memo. 1995-122.

(b)(7)a, (b)(5)(AC)

(b)(7)a, (b)(5)(AC)

(b)(7)a, (b)(5)(AC)

A. [REDACTED] (" [REDACTED] ")

Section 17-803 of the Delaware Limited Partnership Act permits a general partner to wind up the limited partnership's affairs. We have not had access to the [REDACTED] partnership agreement. However, in discussions on August 9, 2000 and August 10, 2000 between Paul Darcy of our office and Mr. Paduano of your office, we were advised that the general partners on the [REDACTED] Management Committee have plenary authority to bind the partners of [REDACTED]. We were further advised that [REDACTED] is still in the process of winding up its affairs, and has not yet filed a certificate of cancellation as provided in Section 17-203 of the Delaware Limited Partnership Act. The Management Committee still exists for the purposes of winding up [REDACTED]'s business. Accordingly, you should obtain a letter executed by the appropriate general partner which states:

All the direct and indirect partners in [REDACTED] and their successors consent and agree to the appointment of [REDACTED] as the TMP for [REDACTED] and have authorized her to execute agreements to extend the statute of limitations to assess: 1) partnership items from [REDACTED] through [REDACTED] (see I.R.C. § 6231(a)(3)); 2) any computational adjustments flowing from [REDACTED] through [REDACTED] (see I.R.C. § 6231(a)(6)); and 3) any affected items flowing from [REDACTED] through [REDACTED] (see I.R.C. § 6231(a)(5)) for the taxable years of [REDACTED] ended November 25, [REDACTED], November 24, [REDACTED] and November 29, [REDACTED].

B. [REDACTED] (" [REDACTED] ")

Section 18-402 of the Delaware Limited Liability Company Act vests the management of a Delaware limited liability company in the members owning more than 50 percent of the limited liability company. However, this section also permits a limited liability company agreement to vest management authority in a delegated manager. Thus, to obtain assurances from [REDACTED] (" [REDACTED] ") on behalf of [REDACTED] you should obtain the current version of [REDACTED]'s limited liability company agreement to determine who may bind [REDACTED] for the purposes of obtaining the assurances set forth below. You should then obtain a letter executed by the appropriate person from [REDACTED] which states:

[REDACTED], as successor in interest to [REDACTED], consent and agree to the appointment of [REDACTED] as the TMP for [REDACTED] and have authorized her to execute agreements to extend the statute of limitations to assess: 1) partnership items from [REDACTED] through [REDACTED] (see I.R.C. § 6231(a)(3)); 2) any computational adjustments flowing from [REDACTED] through [REDACTED] (see I.R.C. § 6231(a)(6)); and 3) any affected items flowing from [REDACTED] through [REDACTED] (see I.R.C. § 6231(a)(5)) for the taxable years of [REDACTED] ended [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED].

### C. The Partnership

Finally, you should obtain assurances from the current general partner of the Partnership. To do this, you should obtain a letter executed by the Partnership's current General partner which states:

[REDACTED] consents and agrees to the appointment of [REDACTED] as the TMP for [REDACTED] for the taxable years of [REDACTED] ended [REDACTED], [REDACTED], [REDACTED] and [REDACTED].

## II. GENERAL MATTERS

As a final matter, we recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit the extension, and IRM 4541.1(8) requires use of Letter 929(DO) to return the signed extension to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed extension is received from the taxpayer, the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event an extension becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Furthermore, please note that Section 3461 of the Restructuring and Reform Act of 1998, codified in § 6501(c)(4)(B), requires Internal Revenue Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Internal Revenue Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you may provide Pub. 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the statute extension. Alternatively, you may advise the taxpayer orally or in some other written form of the § 6501(c)(4)(B) requirement. In any event, you should document your actions in this regard in the case file.

Before proceeding to obtain the letters discussed in this memorandum, we request that you await the National Office's comments, if any, about this advice. Should you have any questions regarding this matter, please contact Paul Darcy at (212) 264-5473 extension 256.

LINDA R. DETTERY  
District Counsel

By: THEODORE R. LEIGHTON  
Assistant District Counsel

Noted:

Linda R. Dettery  
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cc: Paulette Segal  
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Peter J. LaBelle  
Assistant District Counsel

Roland Barral  
Assistant District Counsel

Office of Chief Counsel  
Internal Revenue Service

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to: Territory Manager Robert Skiba  
Attn: Mr. David Harris  
Mr. Lawrence Paduano

from: District Counsel, Manhattan

subject:

Tax Years Ended [REDACTED], [REDACTED], [REDACTED], [REDACTED] and  
[REDACTED], [REDACTED]

Extension of the Statute of Limitations at the Partner Level  
Uniform Issue List # 6229.02-00

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SHOULD BE LIMITED TO THOSE WITH A NEED TO REVIEW THE DOCUMENT  
IN RELATION TO THE SUBJECT MATTER OF THE CASE DISCUSSED  
HEREIN. THIS DOCUMENT IS ALSO TAX INFORMATION OF THE INSTANT  
TAXPAYERS WHICH IS SUBJECT TO I.R.C. § 6103.

This memorandum responds to your request for additional  
advice on how to extend the statute of limitations for the  
assessment of partnership items and affected items from  
[REDACTED] ("Partnership"), a  
Delaware limited partnership subject to the uniform  
partnership audit procedures, I.R.C. § 6221 et. seq. The  
advice rendered in this memorandum is conditioned on the  
accuracy of the facts presented to us. This advice is subject  
to National Office review. We will contact you within two  
weeks of the date of this memorandum to discuss the National  
Office's comments, if any, about this advice. The earliest  
statute of limitations expires on [REDACTED].



**ISSUES:**

1. Who must execute a consent to extend the statute of limitations on assessment of partnership items and affected items from the for the taxable years ended [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED], [REDACTED]?

2. What specific language should be used on the consent to extend the statute of limitations on assessment of the Partnership's partnership items and affected items for the taxable years ended [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED], [REDACTED]?

3. Can the partners of [REDACTED] grant a power of attorney in favor of a representative to execute a consent to execute the statute extension agreement pursuant to § 6229(b)(1)(A).

**FACTS:**

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**I. INTRODUCTION**

The Examination Division is currently auditing the taxable years ended [REDACTED], [REDACTED] through [REDACTED], [REDACTED] of the Partnership, a Delaware limited partnership subject to the uniform partnership audit procedures. § 6221 et. seq. The parties seek to extend the statute of limitations on assessment for these periods.

**II. The Partnership Structure**

**A. Tax Years Ended [REDACTED] Through [REDACTED]**

The Partnership is a Delaware limited partnership. Between [REDACTED] and [REDACTED], the Partnership had only two partners, [REDACTED] (" [REDACTED] ") and [REDACTED] (" [REDACTED] "). [REDACTED] was a [REDACTED] percent general partner of the Partnership, and [REDACTED] was a [REDACTED] percent general partner of the Partnership.

█ percent limited partner of the Partnership. █ was a Delaware corporation. On its Federal partnership information returns, Forms 1065, for these periods, the Partnership designated █ as its TMP. █, in her capacity as an officer of █, executed all tax related documents on behalf of █.

█ was formed in █ and, during the years at issue, was a Delaware limited partnership subject to the uniform partnership audit procedures. For the taxable year ended █, █, █ had █ general partners. On its Forms 1065 for the taxable year ended █, █, █ designated █, in her personal capacity, as the TMP. During █, The █ became █'s sole general partner. At this time, █ and the other general partners became limited partners of █.

**B. █, █ through █, █**

On █, █, the first day of the █ taxable year, █ contributed its █ percent limited partnership interest in the Partnership to █ ("█"), a Delaware limited partnership. Thus, under Delaware state law, █ became the new █ percent limited partner of the Partnership. █ had a █ percent limited partnership interest in █. █ had a █ percent general partnership interest in █. █ is a Delaware limited liability company that, for the period between █ and █, was treated as a partnership for Federal tax purposes.<sup>1</sup> The Partnership states that █ was the TMP of █ for this period.

Also on █, █ merged into █. ("█") pursuant to a statutory merger. █ is the surviving entity, and █ has ceased to exist. █ is a Delaware limited

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<sup>1</sup> For the period █ through █, █ was a █ percent partner of █, and █, a Delaware Limited liability company, was a █ percent partner of █.

liability company owned [REDACTED] percent by [REDACTED]. Thus, between [REDACTED] and [REDACTED], [REDACTED] had a [REDACTED] percent limited partnership interest in the Partnership, and [REDACTED] had a [REDACTED] percent general partnership interest in the Partnership.

For the taxable year ended [REDACTED], [REDACTED] treated both the Partnership and [REDACTED] as its "branches" for Federal income tax purposes. The Examination Division has determined that [REDACTED] has a single owner and, therefore, is considered a disregarded entity pursuant to Treas. Reg. § 301.7701-3(b)(1)(ii). Although the Partnership remains a limited partnership under state law, it has ceased to be a partnership for Federal tax purposes. [REDACTED] made an election pursuant to Treas. Reg. § 301.7701-3(c) to treat the Partnership as a disregarded entity by filing a Form 8832 effective [REDACTED].

### **C. [REDACTED] To The Present**

On [REDACTED], all the interests of [REDACTED], including its [REDACTED] percent limited partnership interest in [REDACTED], were transferred to [REDACTED]. [REDACTED] terminated under § 708(b)(1)(A)<sup>2</sup> and merged into The [REDACTED] under Delaware state law. Thus, The [REDACTED] replaced [REDACTED] as the [REDACTED] percent limited partner of [REDACTED]. The Partnership states that [REDACTED] will remain [REDACTED] [REDACTED] TMP for tax periods subsequent to [REDACTED]. [REDACTED] and [REDACTED] still remain the partners of the Partnership for state law purposes. However, [REDACTED] will continue to treat [REDACTED] and the Partnership as branches for Federal income tax purposes. Prior to [REDACTED], the Partnership never attempted to designate a new TMP pursuant to Treas. Reg. § 301.6231(a)(7)-1.

### **III. THE PARTNERSHIP'S PROPOSALS**

In a memorandum dated [REDACTED], we made the following conclusions on how the Examination Team should proceed in this case:

For the taxable years ended [REDACTED], [REDACTED], [REDACTED]

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<sup>2</sup> Unless otherwise indicated, all statutes referred herein are sections of the Internal Revenue Code.

■, ■ and ■, ■, the Partnership cannot designate a new TMP under any of the subsections of Treas. Reg. § 301.6231(a)(7)-1(a). However, the IRS can enter into an agreements to extend the statute of limitations pursuant to § 6229(b)(1)(A) with the individual and corporate partners of ■ as successor in interest to ■.

For the taxable years ended ■, ■, ■, ■, ■ and ■, ■, you may again designate an indirect partner of the Partnership as TMP. However, any such designation is very risky. Absent obtaining agreements to extend the statute of limitations pursuant to § 6229(b)(1)(A) with the individual and corporate partners of ■ and ■, as successor in interest to ■, we advise you to complete the audit of the taxable years ended ■, ■, ■, ■ and ■, ■ prior to the expiration of the statute of limitations.

The Partnership disputes our conclusions. The conclusions contained in our June 27, 2000 memorandum are correct and have been reviewed and approved by the National Office. We believe the analysis set forth in our June 27, 2000 memorandum clearly and correctly explains the legal position of the Office of Chief Counsel. However, we will address the Partnership's arguments.

On ■, the Partnership sent to you a sample Form 2848, Power of Attorney and Declaration of Representative, in which the individual partners of ■ granted power of attorney to ■ and ■ (the "representatives"). The Form 2848 permits the representatives to execute consents on behalf of each ■ partner. Paragraph 3 of the Form 2848 limits the scope of the power of attorney to each individual's Form 1040. Nowhere does the Form 2848 mention the Partnership or ■. In fact, paragraph 1 of the sample Form 2848 identifies ■ as the taxpayers' address. A copy of the Form 2848 is enclosed herewith in Adobe format. The Partnership apparently seeks to extend the statute of limitations on the assessment of the Partnership's partnership items and affected items through use of a Form 2848 by having each ■

partner grant a power of attorney in favor of a representative, coupled with the representative's execution of a statute extension agreement pursuant to § 6229(b)(1)(A).

On [REDACTED] the Partnership's counsel, [REDACTED], submitted a memorandum (the "Partnership memorandum"). The Partnership memorandum argues:

1. The IRS should designate [REDACTED] as the Partnership's TMP.
2. The partners of [REDACTED] may designate a new TMP pursuant to Treas. Reg. § 301.6231(a)(7)-1(f).
3. [REDACTED]'s TMP can agree to extend the statute of limitations on the assessment of the Partnership's partnership items and affected items on behalf of the partners of [REDACTED].
4. The Partnership should be construed as having the power to authorize a person to agree on its behalf to extend the statute of limitations. See § 6229(b)(1)(B); Cambridge Research and Dev. Group v. Commissioner, 97 T.C. 287 (1991).
5. The partners of [REDACTED] can enter into an agreement to extend the statute of limitations on assessment of the Partnership's partnership items and affected items pursuant to § 6229(b)(1)(A), and such agreements may be executed on behalf of the [REDACTED] partners pursuant to powers of attorney granted by such partners.

Except for argument 5, we disagree with all the arguments contained in the Partnership's memorandum. A copy of the Partnership's memorandum is attached as Exhibit A.

## **DISCUSSION:**

### **I. PARTNER LEVEL CONSENTS**

Section 6501 provides the general rule for respondent to assess a deficiency within three years from the filing of a Federal income tax return. A taxpayer may consent in writing

to an additional period during which assessment may be made. § 6501(c)(4). The period for assessing any income tax attributable to partnership items (or affected items) for a partnership taxable year will not expire before three years after a partnership files its Form 1065. § 6229(a). That period may be extended by agreement at any time during the initial three year period following the partnership's filing of its return. § 6229(b)(1). The period may be extended with respect to all partners by an agreement entered into by the Secretary and, either the TMP or "any other person authorized by the partnership in writing to enter into such an agreement." § 6229(b)(1)(B). See also § 6501(n)(2) (providing period to assess partnership items can be extended as provided for under the provisions of § 6229).

A partner may individually enter into an agreement to extend the statute of limitations on assessment of partnership items and affected items with the Secretary. § 6229(b)(1)(A). Since there is no means that would currently permit the Partnership to designate a TMP, and the Partnership never properly authorized any other person to enter into such an agreement to extend the statute of limitations in writing, a partner level consent pursuant to § 6229(b)(1)(A) is the only failsafe means of extending the statute of limitations.<sup>3</sup>

**A.** [REDACTED]

Since [REDACTED] is a flow through entity, it does not have a Federal income tax liability. Any tax adjustments stemming from the audit of the Partnership will not be assessed against [REDACTED]. Rather, any assessments resulting from adjustments to the Partnership will be made against the [REDACTED] former partners of [REDACTED]. Since no assessment of income tax will ever be made against [REDACTED], any agreement to extend the statute of limitations on assessment entered into by [REDACTED] and the Internal Revenue Service pursuant to § 6229(b)(1)(A) will have no legal effect. The individual and corporate partners of [REDACTED] are partners of the Partnership. § 6231(a)(2). Thus, we believe that the IRS can only enter an effective agreement to extend the statute of limitations on assessment of the Partnership's partnership items and affected items pursuant to § 6229(b)(1)(A) with the individual and corporate partners of [REDACTED].

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<sup>3</sup> These conclusions are discussed in detail in our prior memorandum dated June 27, 2000.

A Form 872 is the proper form for the individual and corporate partners of [REDACTED] to execute. The Form 872 should contain the following language:

This agreement extends the statute of limitations to assess 1) partnership items from [REDACTED] (EIN: [REDACTED]) through [REDACTED] (EIN: [REDACTED]) (see I.R.C. § 6231(a)(3)); any computational adjustments flowing from [REDACTED] (EIN: [REDACTED]) through [REDACTED] (EIN: [REDACTED]) (see I.R.C. § 6231(a)(6)); and 3) any affected items flowing from [REDACTED] (EIN: [REDACTED]) through [REDACTED] (EIN: [REDACTED]) (see I.R.C. § 6231(a)(5)).

An officer of the corporate partners of [REDACTED] must be execute the Form 872.

**B. [REDACTED]**

On [REDACTED], [REDACTED] merged into [REDACTED] pursuant to a statutory merger. [REDACTED] is the surviving entity, and [REDACTED] has ceased to exist as an entity. As the surviving entity in the merger, [REDACTED] has the authority to execute any consent on behalf of [REDACTED] 6 Del. C. § 18-209(g). Thus, if you seek to obtain a consent to extend the statute of limitations at the "partner level" on behalf of [REDACTED], that caption of the Form 872 should read as follows:

"[REDACTED] (E.I.N. \*\*-\*\*\*\*\*), as successor in interest to [REDACTED] (E.I.N. \*\*-\*\*\*\*\*)"

Pursuant to 6 Del. C. § 18-402, the management of a Delaware limited liability company is vested in the members owning more than 50 percent of the limited liability company. However, 6 Del. C. § 18-402 permits a limited liability company agreement to vest management authority in a delegated manager. Thus, if you seek to obtain a consent to extend the statute of limitations at the "partner level" on behalf of [REDACTED], you must obtain the current version of [REDACTED]'s limited liability company agreement to determine who may execute any consent.

**II. THE PARTNERSHIP'S PROPOSAL**

## A. Power of Attorney

As discussed previously, the Partnership apparently seeks to extend the statute of limitations on the assessment of the Partnership's partnership items and affected items by having each [REDACTED] partner grant a power of attorney in favor of a representative, coupled with the representative's execution of a statute extension agreement pursuant to § 6229(b)(1)(A). We have agreed to address this issue and do not believe that the Form 2848 submitted by the Partnership grants the representatives authority to extend the statute of limitations for assessing partnership items and affected items of the Partnership. Consequently, we advise you not to accept the Partnership's proposal.

Section 601.501 of the Statement of Procedural Rules ("SPR") permits a taxpayer to grant power of attorney to another person. In relevant part, SPR § 601.503(a) requires a power of attorney in this case to contain the following information:

- (1) the name and mailing address of the taxpayer;
- (2) the identification number of the taxpayer (i.e., social security number and/or employer identification number);
- \* \* \* \* \*
- (4) the name and mailing address of the recognized representative(s);
- (5) description of the matter(s) for which representation is authorized which, if applicable, must include--
  - (i) the type of tax involved;
  - (ii) the Federal tax form number; and
  - (iii) the specific year(s)/period(s) involved
- (6) a clear expression of the taxpayer's intention concerning the scope of authority granted to the recognized representative(s).



The Form 2848 submitted by the Partnership makes no mention of the Partnership nor does it clearly state that the representatives may extend the statute of limitations with respect to the partnership items or affected items of the Partnership. Additionally, § 6229(b)(3) states "[a]ny agreement under section 6501(c)(4) shall apply with respect to the period described in subsection (a) only if the agreement expressly provides that such agreement applies to tax attributable to partnership items. [Emphasis added]. The Form 2848 submitted by the Partnership does not comply with § 6229(b)(3), as it fails to expressly provide that the power of attorney applies to tax attributable to the Partnership's partnership items and affected items. Thus, the proposed Form 2848 does not comply with § 6229(b)(3) or SPR § 601.503(a). Therefore, we do not believe the Partnership's Form 2848 authorizes the representatives to validly extend the statute of limitations.

Pursuant to SPR § 601.503(b), the Internal Revenue Service generally accepts a properly completed Form 2848 as a power of attorney. Pursuant to SPR § 601.503(c)(5), each partner of [REDACTED] could execute a power of attorney. If you choose to obtain a power of attorney from each partner of [REDACTED], we recommend that you use a Form 2848. Box number 3 of each Form 2848 should be filed out as follows:

| <u>Type of Tax</u> | <u>Tax Form Number</u>                 | <u>Years</u>            |
|--------------------|--|-------------------------|
| Income             | 1040 and 1065<br><b>See Attachment</b> | (the years agreed upon) |

You should then attach the following statement to each Form 2848:

In addition to the powers enumerated in paragraph 5 of this Form 2848, we (or I) grant the representative(s) identified in paragraph 2 to execute any agreement to extend the statute of limitations to assess 1) partnership items from [REDACTED] (EIN: [REDACTED]) through [REDACTED] (EIN: [REDACTED]) (see I.R.C. § 6231(a)(3)); any computational adjustments flowing from [REDACTED] (EIN: [REDACTED]) through [REDACTED] (EIN: [REDACTED]) (see I.R.C. § 6231(a)(6)); and 3) any affected items flowing from [REDACTED] (EIN: [REDACTED]) through [REDACTED] (EIN: [REDACTED]) (see I.R.C. § 6231(a)(5)).

If you can obtain properly executed Forms 2848 containing attachments with the above language from each of the partners of [REDACTED], the designated power of attorney will still have to execute individual Forms 872 on behalf of each partner of [REDACTED]. Thus, it appears obtaining Forms 2848 will not reduce the amount of paperwork or time that will have to be expended.<sup>4</sup>

## **B. The Partnership's Memorandum**

As stated above, we disagree with arguments 1, 2, 3 and 4. Argument 5 contained in the Partnership's memorandum is discussed above. We will address arguments 1, 2, 3 and 4 seriatim.

1. The IRS should designate [REDACTED] as the Partnership's TMP.

The Partnership urges the IRS to designate [REDACTED] as TMP. We extensively discuss this issue on pages 7 through 10 of our memorandum dated June 27, 2000. In a memorandum dated [REDACTED], [REDACTED], stated that the Partnership will likely challenge the acts of any indirect partner who is designated as TMP. The Partnership memorandum now urges the IRS to designate [REDACTED] as TMP. The Partnership cites Chef's Choice Produce, Ltd. v. Commissioner, 95 T.C. 388 (1990), as support for its current position. In Chef's Choice, the only issue before the Court was whether a Bankrupt partnership is subject to the uniform partnership provisions of the Internal Revenue Code. During the examination of Chef's Choice, the IRS designated a direct partner of the partnership as TMP. We fail to see how the Chef's Choice opinion has any direct bearing on the propriety of designating an indirect partner of the Partnership as TMP.

[REDACTED] (b)(7)a, (b)(5)(AC)

[REDACTED] (b)(7)a, (b)(5)(AC)

[REDACTED] (b)(7)a, (b)(5)(AC)

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<sup>4</sup> This whole issue could have been easily avoided if, prior to the time [REDACTED] merged into [REDACTED], the Partnership authorized any other person authorized in writing to enter into an agreement to extend the statute of limitations. § 6229(b)(1)(B); Treas. Reg. § 301.6229(b)-1.

(b)(7)a, (b)(5)(AC)

(b)(7)a, (b)(5)(AC)

2. The partners of [REDACTED] may designate a new TMP pursuant to Treas. Reg. § 301.6231(a)(7)-1(f).

The Partnership cannot rely on Treas. Reg. § 301.6231(a)(7)-1(f) to designate a TMP. Treas. Reg. § 301.6231(a)(7)-1(f) permits the partners with a majority interest in a partnership to designate a new TMP when the general partner is no longer a partner in the partnership. Treas. Reg. § 301.6231(a)(7)-1(f)(1)(iv). However, any such designation must be made by "persons who were partners at the close of such taxable year and were shown on the return for that year to hold more than 50 percent of the aggregate interest in partnership profits held by all partners as of the close of such taxable year." Treas. Reg. § 301.6231(a)(7)-1(f)(2)(iv). The Partnership's Forms 1065 for the [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED], identify only two partners - [REDACTED] and [REDACTED]. The Forms 1065 did not identify the partners of [REDACTED] as partners of the Partnership. Since neither of the entities identified as partners on the Partnership's Forms 1065 for the taxable years ended [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED], [REDACTED] now exist, Treas. Reg. § 301.6231(a)(7)-1(f) does not apply. Accordingly, the partners of [REDACTED] may not now designate a new TMP pursuant to Treas. Reg. § 301.6231(a)(7)-1(f).

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<sup>5</sup> The Partnership's representatives claim that this office recommended that you designate [REDACTED] as TMP for the taxable years ended November [REDACTED] and November [REDACTED]. This office made no such recommendation. (b)(7)a, (b)(5)(AC)

(b)(7)a, (b)(5)(AC)

(b)(7)a, (b)(5)(AC)

3. ██████████'s TMP can agree to extend the statute of limitations on the assessment of the Partnership's partnership items and affected items on behalf of the partners of ██████████ pursuant to § 6229(b)(1)(A).

On page 10 of our memorandum dated June 27, 2000 we stated:

Since ██████████ is a flow through entity, it does not have a Federal income tax liability. Any tax adjustments stemming from the audit of the Partnership will not be assessed against ██████████. Rather, any assessments resulting from adjustments to the Partnership will be made against the several hundred former partners of ██████████. Since no assessment of income tax will ever be made against ██████████, any agreement to extend the statute of limitations on assessment entered into by ██████████ and the Internal Revenue Service pursuant to § 6229(b)(1)(A) will have no legal effect... Thus, we believe that the IRS can only enter an effective agreement to extend the statute of limitations on assessment of the Partnership's partnership items and affected items pursuant to § 6229(b)(1)(A) with partners of ██████████.

Section 6229(b)(1)(B) authorizes the TMP of ██████████ to extend the statute of limitations with respect to the partnership items or affected items of ██████████. There is no support for the proposition that the TMP of ██████████ has authority to extend the statute of limitations with respect to the partnership items or affected items of the Partnership. Furthermore, § 6229(b)(1)(A) does not grant any authority to the TMP. An extension pursuant to § 6229(b)(1)(A) must be executed by the individual partners who are subject to assessment.

4. The Partnership should be construed as having the power to authorize a person to agree on its behalf to extend the statute of limitations. See § 6229(b)(1)(B); Cambridge Research and Dev. Group v. Commissioner, 97 T.C. 287 (1991).

We agree that a person other than the TMP can be authorized to extend the statute of limitations pursuant to § 6229(b)(1)(B). However, in this case, the Partnership made no such authorization. On page 12 of our June 27, 2000, we

state:

In this case, the specific procedures of Treas. Reg. § 301.6229(b)-1T have not been met. However, in Cambridge Research and Development Group, 97 T.C. 287 (1991), the Tax Court held that a written partnership agreement can satisfy the requirement of § 6229(b)(1)(B) that authorization to extend the period of limitations must be manifested in writing. Unfortunately, the Partnership's partnership agreement does not permit the current partners of the Partnership to bind the former partners. While the Partnership's partnership agreement sets forth powers of the "partners," the agreement specifically states that former partners are not "partners." Thus, neither [REDACTED] nor [REDACTED] can execute a Form 872-P pursuant § 6229(b)(1)(B) for the taxable years ended November 25, [REDACTED] through November 27, [REDACTED].

Additionally, the Partnership memorandum fails cite to any Delaware law that would permit the current partners of the Partnership to bind the former partners. Thus, we do not believe that the Partnership authorized a person other than the TMP to extend the statute of limitations pursuant to § 6229(b)(1)(B).

## **VI. GENERAL MATTERS**

As a final matter, we recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit the extension, and IRM 4541.1(8) requires use of Letter 929(DO) to return the signed extension to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed extension is received from the taxpayer, the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event an extension becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Furthermore, please note that Section 3461 of the Restructuring and Reform Act of 1998, codified in §

6501(c)(4)(B), requires Internal Revenue Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Internal Revenue Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you may provide Pub. 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the statute extension. Alternatively, you may advise the taxpayer orally or in some other written form of the § 6501(c)(4)(B) requirement. In any event, you should document your actions in this regard in the case file.

Before proceeding to obtain the consents or Forms 2848, we request that you await the National Office's comments, if any, about this advice. Should you have any questions regarding this matter, please contact Paul Darcy at (212) 264-5473 extension 256.

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